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IN THE

Supreme Court of the United States

October Term, 1942.

No. 67.

WADE GARRETT,

Petitioner,

v.

MOORE-McCORMACK COMPANY, INC., and AMERICAN SCANTIC LINE,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

RESPONDENTS' BRIEF.

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RESPONDENT'S BRIEF.

I.

SUMMARY OF FACTS.

A statement or summary of the facts, the Jury having returned a verdict in favor of the petitioner, may seem irrelevant. However, in this case there are two important reasons for the summary of facts given below.

First, one of the issues now before the Court is the validity of a certain release admittedly executed by the petitioner. The only testimony calculated to establish the invalidity of this release comes from the mouth of the petitioner himself. Therefore, the credibility of the petitioner and particularly the credibility of his testimony relating to or attempting to establish the invalidity of the release becomes one of the most important issues in this case.

Second, the petitioner in his brief has seen fit to make a "The Statement of the Case" which in several instances

is misleading and incorrect and which, therefore, makes necessary this "Summary of Facts" in order to give a clear picture of the fact situation.

The petitioner makes a statement in his brief which must, at the very outset, be challenged on the grounds that there is no foundation, argumentative or otherwise, to support it.

In Section III of his brief under the caption "The Statement of the Case", at page 2, the petitioner states what he contends are the facts of this case. We quote from petitioner's brief at bottom of page 2, "Note, All references to the record followed by the letter "a" refer to the typewritten record filed with the petition for writ of certiorari".

The petitioner then proceeds to make a statement starting about a third of the way from the top of page 5 of his brief and ending above the first paragraph on page 5 which statement we quote:

> "At the trial of the case respondent introduced an X-ray which purported to have been taken in 1935 by the Public Health Service in Philadelphia and which showed fractures of the 3rd and 4th transverse processes. The X-ray plate itself had two different numbers upon it, both in handwriting, and not in the usual printed form and the envelope within which the plate was contained was marked on the outside 'Negative'. The plate was introduced for the purpose of showing that the petitioner suffered from fractures on the spinal processes before this accident. Petitioner then promptly offered the entire record of the Public Health Service from which the aforementioned X-ray plate had been taken. This record included the report of the government X-ray specialist who had read the plate which was taken in 1935 and whose report showed the

plate which he took at that time to be negative for fractures. This offer was objected to by the respondent and the objection was sustained by the Trial Judge so that the X-ray plate went into the evidence without the report of the specialist which was made at the time the original X-ray was taken."

Respondent makes the following observations concerning the above quotation:

1. There is absolutely no foundation in the record for such a statement nor is there anything in the record which would give it even inferential verity.

2. The petitioner states in his brief that his statement of facts contains a reference by page number to the record filed with the petition for writ of certiorari. The statement quoted above however, does not contain any reference by page or otherwise to the record for the obvious reason that the record contains absolutely nothing to support such a statement.

3. The statement of facts given by the petitioner in his brief is substantially the same, in fact almost word for word the same, as the statement of facts given in his brief filed with the Supreme Court of the State of Pennsylvania, with the exception of the statement quoted above which was omitted.

4. References to the x-ray taken of the petitioner in August of 1935 are found in the record accompanying the petitioner's petition for writ of certiorari at the following pages: (142a), (143a), (146a), (178a), (181a), (261a), (279a), (280a).[1]

[1] References to the record followed by "a" refer to the typewritten record filed by petitioner with the petition for writ of certiorari.

5. An examination of the complete record and particularly of the references given in paragraph 4 above clearly show that there was not produced in Court and/or refused in evidence a record from the Public Health Service disclosing that the findings or reading of the x-ray in question were "negative". The printed record in this Court at Page 18 in the opinion of the Supreme Court of Pennsylvania states "Nothing that the plaintiff wished to put in the record was excluded pursuant to the local rule".

6. At the trial both the petitioner's doctor and the respondent's doctor read the x-ray taken in August of 1935 and both agreed that it showed fractures in the same places as the x-rays taken in 1937 after the alleged accident which is the subject of this suit.

7. This case took approximately one week to try in the Court below and the x-ray of August 1935 was produced on the third day of the trial. The petitioner, however, did not recall his expert witness, one, Dr. Ostrum who had testified on first day of the trial as to his findings based on the x-ray of 1937, to read the x-ray of August 1935.

8. The Common Pleas Court and the Supreme Court of the State of Pennsylvania both had before it the complete record but did not doubt the authenticity of the x-ray of 1935. Below are given quotations from the opinions of the Trial Court and of the Supreme Court of Pennsylvania which clearly indicate that no question of the authenticity of the x-ray in question was raised until now.

Transcript of Record, page 10:

> "The testimony produced by the plaintiff is entirely unreliable."

Transcript of Record, page 11:

"When one considers that the major portion of his claim of injuries is that he has arthritis from the injury received to his spine, one can see how doubtful this claim for injuries is. When his own physician, who had testified as to what the x-ray taken in 1937 disclosed, was shown an x-ray plate which was after the accident in 1935 and was asked if those were the same fractures he saw in the x-ray plates (those of 1937) his reply was Yes.

"It therefore seems clear that the condition from which this man alleges he is now suffering was present in 1935. It may well be that the arthritic condition has developed, but the same fracture existed in both x-rays."

The quotations above were also quoted by the Supreme Court of Pennsylvania in its opinion. See Transcript of Record pages 15 and 16.

The petitioner claims that while in the service of the respondent's vessel a heavy hatch cover fell on him (R. 25a) and that as a result he sustained fractures of the jaw, ankle, hand and of certain transverse processes of the spine. (R. 132a.)

The petitioner admits that on March 24th, 1937, he came to the office of the respondent's claim agent (R. 37a), and there signed a release of his claim for damages resulting from his alleged injuries. He attempts to nullify the legal effect of this release by stating that on the morning in question he was intoxicated, and that he had taken several veronal pills which he had previously, and are generally taken to encourage sleep.

The petitioner admits that after the alleged accident, he walked under his own power to the galley of the vessel

and had a cup of coffee (R. 27a); and from there walked to the mate's room for some liniment and tape (R. 27a); and that the next day he went ashore to a Doctor Nielsen who examined him and found contusions of the hand and foot, and recommended that he be placed on light duty for two or three days (R. 28a, 29a), (R. 276a). The petitioner further admits that two days after he sustained the alleged injuries he went ashore in Copenhagen to a saloon where he had a few drinks; that he came back to the vessel that night with a note to the Captain from the proprietress of the saloon asking for a certain sum of money; that the Captain refused to give him any money and ordered him to bed (R. 70a, 71a). It was not until after this occasion that he went to a hospital at Gdynia. (R. 72a.)

The Master of the vessel on which the petitioner claims to have been injured, testified that on the occasion (R. 188a) when the petitioner returned to the vessel after having been ashore and visiting the saloon in Copenhagen, he was intoxicated, that his jaw was swollen and he was bleeding at the mouth. The Captain further testified that because of petitioner's condition he refused to give him the money he requested and ordered him to his quarters and to bed. The Master further testified that he saw the petitioner after the injury, alleged to have been caused by the falling of a hatch cover, and before he went to the saloon at Copenhagen. Except for iodine on his hand, the petitioner showed no evidence of having been injured (187a) at that time.

As to the circumstances surrounding the execution of the release, the petitioner admits that he came to the office of the respondent's claim agent on four different occasions; that on the first occasion he signed a statement of the facts on which he based his claim (R. 79a); and that he signed a

receipt on each of the first three occasions for sums paid to him on account of "injury" (R. 74a, 75a). (The record (278a) shows the word "Inj." on the three receipts which were offered in evidence as "illegible" but the testimony of Alfred O. Suessmuth (R. 101a) clearly indicated that the word transcribed in the record as "illegible" is "Inj", an abbreviation for injury.)

The respondent's testimony, which stands uncontradicted, establishes the fact that the petitioner was offered $100.00, less advances, in settlement of his claim on March 23, 1937 and was told to go home and think it over and come back the next day; that the petitioner returned the next day, agreed to accept the $100.00 and signed the release (R. 96a, 98a). The petitioner was familiar with releases, having signed at least three others on prior occasions (R. 59a, 62a, 68a, 69a). The petitioner further admits that he was given the release after he had signed it and that he went unattended by anyone in respondent's employ, from the claim office of the company in Hoboken, New Jersey, to their paymaster's office in New York City; and that at the paymaster's office he delivered the release and received his money (R. 38a). The petitioner further testified he knew he would have to get a discharge from the Staten Island Hospital in order to be admitted to another hospital. After he received the consideration for the release he went to the Staten Island Hospital and there obtained his discharge (R. 38a). He further testified that after receiving his discharge he came to Philadelphia. The petitioner's affidavit to the statement of claim in this case was executed in Philadelphia on March 27, 1937. (R. 9a, R. 85a.) He further testified that he returned to the hospital in Staten Island, although he had obtained a discharge from that hospital on the rep-

resentation that he wanted to go to a hospital in Chicago. He remained in the Marine Hospital at Stapleton, New York, until May 13th, 1937. On June 10th, 1937 he obtained a position at his regular employment as a seaman and continued to work regularly on six different vessels until the end of that year (R. 86a, 87a, 88a).

The most serious claim of personal injuries made by the petitioner is the alleged fracture of certain transverse processes. It was clearly established at the trial that these transverse processes had been fractured in another accident which occurred in 1935, two years before the alleged accident which is the subject of this action. This was established not only by the testimony of Doctor Russell, who testified for the respondent (R. 181a) from x-rays taken at the United States Public Health Service in August of 1935, but also by the testimony of the petitioner's doctor (R. 143a).

At the time of the trial an action was pending by this same petitioner, Wade Garrett, against the Southern Steamship Company in the United States District Court for the Eastern District of Pennsylvania (R. 52a). The petitioner testified in that action he was not claiming for any injury to his spine. However, in the statement of claim filed as of September Term 1935, No. 19010, by the petitioner in that action he did allege injury to his spine (R. 262a).

The record does not disclose any competent evidence that the injuries for which the petitioner is claiming damages were sustained in the manner and at the time alleged. The record (273a) merely shows a United States Public Health Service abstract of clinical record of an examination made March 18th, 1937, almost two months after the

alleged accident. Although this record indicates evidence of old fractures of the transverse processes, the record does not of itself, nor does any other competent medical testimony in the case, indicate even approximately when these fractures were sustained. There is only the petitioner's own uncorroborated testimony that these injuries were sustained in an accident on January 23d; and as against this, the record discloses irrefutable proof that the most serious of the injuries, to wit, fractures of the transverse processes of the spine, were sustained two years before this alleged accident. The petitioner's long accident and poor health record revealed in his cross-examination makes it extremely probable that he sustained the other injuries, for which he is here claiming, in various fights and accidents which occurred prior to his service on the "Minnequa" (53a-70a).

II.

SUMMARY OF ARGUMENT.

The argument of the respondent is an amplification of the following propositions:

1. Where a seaman brings suit in a State Court seeking recovery for injuries sustained on board a vessel, his action is determined by the common law of the state or forum of his selection.

2. The petitioner was not denied any substantive right which he had in admiralty.

3. The petitioner's release was a bar to his action in the State Court and if he had brought his action in admiralty or on the law side of the District Court the petitioner's release would have likewise been a bar to his action.

III.
ARGUMENT.

1. Where a Seaman Brings Suit in a State Court Seeking Recovery for Injuries Sustained on Board a Vessel, His Action Is Determined by the Common Law of the State or Forum of His Selections.

Article III, Section 2 of the Constitution of the United States provides that the judicial power of the United States shall extend:

> "to all cases of admiralty and maritime jurisdiction."

The Act of Congress of June 10th, 1922, c. 216 Section 2; 28 U. S. C. A. Sec. 371, provides:

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the Courts of the several states;"

And provides:

> "Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it . . ."[2]

The clear meaning of the language of the Constitution and of the Judiciary Act, cited above is that Admiralty Courts (Federal) have exclusive jurisdiction of all admiralty matters unless the common law of the various states is competent to give a remedy.

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[2] The quotation given from the Judiciary Act above is a re-enactment of the Judiciary Act of 1789.

That is, although the jurisdiction of admiralty is exclusive as to all maritime matters, nevertheless, under certain circumstances cognizable in admiralty, the common law of the various states may be competent to give a remedy and if it is, the common law remedy is available.

In *The Moses Taylor v. Hammons*, 71 U. S. 411; 4 Wall. 411 (1867), judgment was rendered in the State Court of California in favor of the plaintiff for a breach of contract to transport him as a steerage passenger. The action was instituted under a California statute which provided for proceedings in rem against vessels. This Court reversed the judgment and dismissed the action for want of jurisdiction.

The opinion states, page 427:

> "The case presented is clearly one within the admiralty and maritime jurisdiction of the Federal Courts. The contract for the transportation of the plaintiff was a maritime contract."

And at page 431:

> "The case before us is not within the saving clause of the 9th section. That clause only saves to suitors 'the right of a common law remedy, where the common law is competent to give it'. It is not a remedy in the common law courts which is saved but a common law remedy. A proceeding *in rem*, as used in the Admiralty Court is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute."

In the case cited above full force and effect was given to the Sections of the Constitution and Judiciary Act relating to the exclusive jurisdiction of the Federal Courts

over maritime matters. The circumstances of the cited case were such that the common law was not competent to give a remedy and it was therefore held that the State Court did not have jurisdiction.

In *Belden v. Chase*, 150 U. S. 674 (1893), the meaning of the saving clause is clearly demonstrated. The action arose out of a collision between two vessels in the Hudson River. The owner of one of them instituted an action for damages in the State Court of New York against the owners of the other vessel. Here the common law was competent to give a remedy. But the remedy given was that provided by the common law and not the admiralty law. The State Court held that if the plaintiff were guilty of contributory negligence, his contributory negligence barred recovery. The plaintiff contended that under the admiralty rule (and his contention under that rule was correct) the doctrine of divided damages should be applied. This Court held that the common law and not the admiralty law should govern the case.

This Court said at page 691:

> "The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels, when both are in fault contributing to the collision, has long prevailed in England and this country. The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29. But at common law the general rule is that, if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. Atlee v. Packet Co., 21 Wall. 389.
>
> "In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the in-

jury, or, in other words, he could not recover, though defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of."

If the doctrine of *The Moses Taylor* case and of *Belden v. Chase* is still the law of the land it should be unnecessary to proceed further. Neither case has been overruled, although both have been frequently cited, and, therefore, it may be stated with confidence that their doctrines are still good law.[3]

The petitioner bases his argument (petitioner's brief, page 8) on *Chelentis v. Luckenbach* and *Carlisle Packing Co. v. Sandanger*. These cases relate to maritime torts and were actions started in State Courts. But it is respectfully submitted that the petitioner has misconceived the import of their holdings.

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[3] In *In Re Pennsylvania R. Co.*, 48 F. (2d) 559 (1931), the Circuit Court of Appeals, Second Circuit, it was stated by L. Hand, Circuit Judge, page 566:

"We can see no escape therefore from concluding that as between a common-law court and a court of admiralty the question is one of procedure, though in general the law is otherwise."

. . . . .

"It was not suggested in *The Max Morris* that the liability there in suit was subject to divided damages because it was maritime, or that action would not be barred at law. Rather it was implied that the rule of the forum controlled. So too in *Belden v. Chase* it was assumed that the doctrine varied with the court. Nor can we see anything in *Chelentis v. Luckenbach S. S. Co.*, looking otherwise."

. . . . .

"So far as we can find there is nothing in the books beyond our own overruled dicta which throws doubt upon *Belden v. Chase*."

Chelentis v. Luckenbach was an action at law started in the Supreme Court of New York. The plaintiff's injuries were sustained in carrying out the orders of a superior officer while the vessel, on which he was employed, was at sea. The plaintiff relied on the Act of March 4, 1915, c. 153, 38 Stat. 1164, 1185 which provided:

> "That in any suit to recover damages for any injury sustained on board vessel in its service seamen having command shall not be held to be fellow servants with those under their authority."

The case was transferred to the United States District Court because of diversity of citizenship. The action was continued as a suit at common law in the District Court. The plaintiff contended the Act of Congress of 1915 eliminated the "fellow servant rule". This Court held that the Act of 1915 could only apply in a suit in admiralty but since the "fellow servant rule" was not a defense in admiralty, the Act was of no effect.

The significance of the *Chelentis* case is, therefore that the Act of 1915 could not extend in application beyond suits brought in admiralty; and, as applied to admiralty cases the Act was meaningless because the "fellow servant rule" was not a defense. The case is not apposite. Only the reasoning of the opinion, not concurred in by Mr. Justice Holmes, seems to favor the petitioner. Such reasoning, it is submitted, is no more than dictum. The reasoning was that only admiralty remedies may be applied in State Courts (a premise in direct contradiction to the Judiciary Act and to the doctrine of *Belden v. Chase*).

The Respondents suggest that the same results could have been reached and no cause for misunderstanding given, if the reasoning had been that the Act of 1915 did not extend in scope beyond actions brought in admiralty, and,

therefore, recovery in the case, which was brought at common law, was barred by the common law "fellow servant rule".

In the *Carlisle Packing Company* case the plaintiff instituted his action in the State Court of Washington alleging that the injuries he sustained resulted from the negligence of the owner of the boat on which he was employed. The circumstances of the accident, the storage of gasoline in a can marked "coal oil" and the absence of life preservers, constituted a cause of action under the common law. Judgment in favor of the plaintiff was affirmed in the Supreme Court of the State of Washington and in the Supreme Court of the United States. It was unnecessary for the United States Supreme Court to base its decision on admiralty law, as the common law was competent to give the same remedy. As in the *Chelentis* case the reasoning has no more force than dicta; which dicta is likewise in direct conflict with the Constitution and the Judiciary Act.

The petitioner places much reliance upon decisions arising under the Federal Railroad Employers Liability Act. In fact twelve of the twenty-eight cases cited by petitioner, are such cases. The import of these decisions has likewise been misconceived by petitioner.

Neither the Constitution nor the Judiciary Act give the Federal Court exclusive jurisdiction of railroad employees as distinguished from the exclusive jurisdiction given to the Admiralty Court (Federal) in actions involving seamen.

The Federal Railroad Employers Liability Act in effect is an express direction from Congress to interpret the rights of railroad employees injured in the course of their employment, in accordance with the provision of that Act whether the action be instituted in a State or Federal

Court. On the other hand, as to seamen, we have an express direction from the Constitution and from Congress through the Judiciary Act, forbidding the several states to apply admiralty rules because jurisdiction is given exclusively to the Federal Courts.

2. The Petitioner Was Not Denied Any Substantive Right Which He Had in Admiralty.

The procedural rules of the State Court of Pennsylvania did not result in the exclusion of any testimony or evidence relating to the validity of the release. The Supreme Court of Pennsylvania stated in its opinion (Record, page 17):

> "It is unnecessary, in disposing of this appeal, to consider whose duty it was to put in the evidence on the subject because none was excluded; all the evidence is in and the legal question is what is its effect? As the evidence was insufficient to go to the Jury, the learned trial judge should have directed a verdict for defendants on the ground that the release was valid. The verdict not having been directed, as requested by defendants, it was the duty of the Court in banc, in considering defendants' motion for judgment non obstante veredicto, to decide whether the evidence should have been submitted to the Jury (citing authorities) and if insufficient, to enter judgment for the defendants."

Therefore, it makes no difference at this stage in the proceedings whether procedurally the plaintiff had the burden of first moving forward with evidence intended to establish the invalidity of the release or whether the defendants had that burden, as petitioner contends they had by the so-called admiralty rule. Since all of the evidence relating to the subject matter in question was admitted it became the duty of the presiding judge whether the action be

in admiralty or at common law, to determine the question of the validity of the release. The Common Pleas Court in which the case was tried and the Supreme Court of Pennsylvania both examined this evidence and both reached the conclusion that nothing was produced to establish the invalidity of the release.

It is conceded that a state may not require a plaintiff to prove as part of his cause of action, under Federal law, (other than admiralty law, which is not applicable in state courts) more than what constitutes the cause of action as defined by that law. This was held in *Central Vermont Railway v. White*, 238 U. S. 507, 35 Sup. Ct. 865. The opinion in that case goes on to state, however, pages 511 and 512:

> "As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted, the State Court can, in those and similar instances, follow their own practice even in the trial of suits arising under the Federal law."

As a matter of fact, the petitioner in the case at bar was not required by any action of the trial judge to move forward with testimony attempting to establish the invalidity of the release. This he did voluntarily in response to questions of his own counsel under direct examination (Record 37a; 38a).

The law of the State of Pennsylvania, as well as the maritime law, permits a plaintiff to overcome the effect of a release under certain and similar circumstances. The only difference between the two tribunals is not one of substance but one of procedure or burden of proof. That is, which party should first move forward with testimony relating to the validity of a release? Under the maritime

law there are authorities tending to establish the doctrine that the District Court Judge, sitting in Admiralty without a Jury should require the defendant who relies on a release to first offer testimony to establish its validity. This doctrine of the admiralty law is conceded only for the purpose of this argument. The writer was unable to find any United States Supreme Court case sustaining it. In fact Mr. Justice Holmes while presiding over the Supreme Court of Massachusetts thought otherwise.[4] Under the law of the State of Pennsylvania the trial judge, irrespective of the presence of a Jury, must first be satisfied that the plaintiff, attempting to invalidate the release, presents testimony of

[4] See *Rosenberg v. Doe*, 146 Mass. 191, where Mr. Justice Holmes stated concerning the release of a seaman, "If they do sign, the effect of their signatures must be determined by the ordinary rules of law. Signature under such circumstances as we have supposed conclusively imports assent to the instrument, and the instrument expresses consent to the settlement. It is contrary to first principles to allow a person whose overt acts have expressed assent to deny their effect on the ground of an undisclosed state of his mind for which no one else was responsible.. *O'Donnell v. Clinton*, 145 Mass. 461. The common law makes no exception to these principles in favor of seaman, nor do we see any evidence that the statute meant to make one."

In *The Adonis*, 38 F (2d) 743, which was an action in Admiralty, the release of the plaintiff, a seaman, was set up as a bar. The court held the release to be valid and dismissed the libel. Woolley, Circuit Judge, speaking for the court stated in the opinion at page 744:

> "The Libellant realizing that to put the release out of the case he must sustain the burden of proving that he signed it through duress, fraud, or mistake, says, finally, that he signed it through mistake in that he did not read it, and 'thought it was a receipt for the $125. (he) was getting.' There is no evidence that the libellant could not read. There is evidence that he looked at the paper. He signed it. He is therefore presumed to have known and understood its contents."

sufficient weight and credibility to raise a substantial question as to its validity. If so, the plaintiff is entitled to go to the Jury on that question.

The petitioner in support of his argument that the burden of proof is on the party asserting the release as a defense, on page 24 of his brief cites the case of *Deemer v. United Fruit Company*, 1937 A. M. C. 286, wherein it was stated by Judge Maris then a District Judge, now a Judge of the Circuit Court of Appeals for the Third Circuit, that: "• • • one who sets up a seaman's release has the burden of sustaining it as fairly made with and fully comprehended by the seaman."

The *Deemer* case was an action at law in the District Court and the question of the validity of the release was submitted to the Jury which rendered a verdict in favor of the plaintiff. Subsequently the Court entered judgment for the defendant upon a point of law reserved by the Court on the ground that the plaintiff's testimony to the effect that he did not know that he was signing a release but thought that he was signing a receipt for some money which was due him, was not sufficient to raise a question for the Jury.

The plaintiff in this action is attempting to bring his claim, maritime in nature, in the State Court where he may have a trial by Jury, and bring with him certain procedural benefits which the law of the forum of his selection does not permit.

The plaintiff is also attempting to gain an additional advantage not available in admiralty; that is to have a Jury determine the question of liability and fix the amount of his award. In the Admiralty Court if the release is not valid, the Judge determines liability and fixes the amount of the award.

3. The Petitioner's Release Was a Bar to His Action in the State Court and if He Had Brought His Action in Admiralty or on the Law Side of the District Court the Petitioner's Release Would Have Likewise Been a Bar to His Action.

The petitioner's entire argument is based on the premise that his release, if he had instituted his action in admiralty would have been judicially determined to be invalid. If he is mistaken in this, then his entire case must fall and consideration of any of the other issues in this appeal becomes unnecessary.

It is here urged that this Court or any Court below in determining the validity of the release in this case, on the evidence in this record, in the light of any recognized rules of interpretation, no matter how favorable to the petitioner, would have reached the conclusion that the release was valid. It is difficult to conceive of a set of circumstances which would tend more than those in this case, to establish the validity of a release. To declare this release invalid would be tantamount to a judicial determination that releases of seamen, regardless of the circumstances leading up to and surrounding their execution, are invalid and that no claim brought by a seaman may be settled out of Court.

Is there any justification for assuming that if a State Court sat as a Court in Admiralty giving full appreciation to the fact that the seaman is the ward of the admiralty and that his rights must be jealously guarded by the Court, would have reached any different conclusion as to the validity of the release than was reached in this case? In determining that question the judge, whether he be sitting in admiralty or in the State Court, must consider the following elements:

1. The credibility of the testimony calculated to invalidate the release.

2. All of the testimony tending to invalidate the release comes from the mouth of the plaintiff or petitioner himself and is contradicted by two witnesses for the defendant.

3. The improbability of the petitioner, if he sustained the serious injuries he alleges on board the vessel, of being able to walk to the galley for coffee and to go ashore, two days after the alleged accident, to a salon and there drink and run up a bill of 30 kronins.

4. The improbability that a doctor in Copenhagen would after an examination of the petitioner one day after the alleged accident, find only slight injuries which would cause the petitioner to be placed on light duty for two or three days.

5. The petitioner's testimony that in another suit, then pending, he was not claiming for any injuries to his spine whereas the statement of claim filed in that action to which he had also sworn, did claim injuries to the spine.

6. The x-ray picture taken in 1935 of the petitioner (two years before the alleged accident which is the subject of this action) showed fractures in identical places with the fractures shown in the x-rays relied upon in this action.

7. The petitioner came voluntarily to the office of the respondent's claim agent on four or five different occasions and discussed his claim against the respondent company.

8. The respondent's claim agent gave the petitioner a figure at which it was willing to settle and the claim agent did not at that time urge the petitioner to accept but suggested that he go home and think it over and come back the next day.

9. The petitioner did return voluntarily the next day and signed a release.

10. The petitioner in his own testimony and almost in the same sentence gives inconsistent explanations of his act in signing the release; one being that he signed it because of the threat made by the claim agent to put him in jail and the other that he signed it because he was under the influence of intoxicating liquor and of veronal pills calculated to bring on sleep but which he had taken that morning.

11. The petitioner after signing the release was given certain papers including the release, and proceeded from the claim agent's office in Jersey City to the respondent's paymaster's office in New York City, a trip requiring upwards of one-half hour and there obtained his money.

12. The petitioner proceeded from there to the hospital at Staten Island and obtained a discharge so that he could go to a hospital in Chicago but instead went to Philadelphia where he consulted his attorney, the same attorney who represented him in the action against the Southern Steamship Company which was pending at the trial of this action, and there signed the statement of claim filed in this action.

The application of the "clear, precise and indubitable" rule is totally unnecessary. Since, no matter where the action is brought or what rules of procedure or interpre-

tation are applied a Judge must determine the question of validity of a release, it is submitted that an Appellate Court also may and should pass upon the validity of the release in the light of the circumstances set forth above.

The general rule relating to releases is the same throughout the various Courts and jurisdictions of the land. In general terms it has been frequently stated to be THE SIGNER OF A DEED OR OTHER INSTRUMENT EXPRESSIVE OF A JURAL ACT IS CONCLUSIVELY BOUND THEREBY.

The various Courts and jurisdictions throughout the land all recognize an exception to the general rule in cases where the signature to the release has been obtained through mistake, fraud or duress. The general rule relating to this exception is that evidence to overcome the effect of the admitted signature on the release must be clear, precise and indubitable. But as to the release of seamen in admiralty actions there is a conflict of authority as to the burden of proof and, the extent, the seaman being a ward of the admiralty, to which the Admiralty Judge should go in inquirying into the circumstances relating to its execution, to make certain that the seaman has not been imposed upon.

Following are decisions where, although the validity of the release was carefully inquired into by the Judge, the release was held a bar to the seaman's action under circumstances considerably more questionable than those in the case at bar.

In the *Annie L. Mulford*, 107 Fed. Rep. 525 (1901), the Court, sustaining the release of a seaman, stated, page 526:

> "There is no such proof to be found in the present record. The libellant's testimony stands alone in support of his allegations, and it is positively contra-

dicted by the testimony of the casualty company's agent. In such a situation, no corroborating circumstances being present, the written instrument must prevail. The libel is dismissed."

In *Harmon v. United States*, 59 F (2d) 372, the Circuit Court of Appeals, Fifth Circuit, points out that the admiralty doctrine requiring special inquiry as to the release of a seaman is more rigidly applied to clauses in shipping articles purporting to release rights which seamen have, and to releases of claims for wages.

The Court there stated, page 373:

"While the record would easily support a finding that in releasing his claim appellant did not act wisely, it does not at all appear therefrom that he was either mentally or physically incapacitated from fully understanding and appreciating what he deliberately did. . . . Here is a case of a matter in controversy, negotiations in regard to which, protracted over a considerable space of time in an atmosphere not of overreaching and double dealing, but of frankness and plain dealing, finally resulted in a settlement with nothing really set up to defeat it except the claim which of course may not avail, that one side obtained a better bargain than the other. Chicago and N. W. Ry. v. Wilcox, 116 F. 913."

In *James E. Wilson v. McCormick Steamship Co.*, 1940 A. M. C. 1004, suit was instituted in the State Court of California. The plaintiff, a seaman, claimed damages for personal injuries sustained while employed on defendant's vessel. Plaintiff's release was set up as a bar to his action.

The plaintiff alleged, with reference to the circumstances of signing the release, that at the time he was very weak, having just left the hospital that morning, that he

could only walk very slowly and that he had to stop several times and rest, that his legs were very weak and it seemed they would not hold his weight, that traffic made him dizzy and everything went hazy in front of his eyes, that he had terrific pain in his back. After signing the release he was given a check and went with a representative of defendant company to the bank where it was cashed.

The plaintiff produced a physician skilled in the treatment of nervous and mental diseases, who testified that the plaintiff, at the time he signed the release, was suffering from what is known as "anxiety neurosis", which disease though only temporary, would prevent him from having full charge of all of his mental faculties and cause him to be "unable to arrive at an answer which would be in keeping with his normal mental state when he was not ill."

The jury, disregarding the release, found a verdict in favor of the plaintiff.

On appeal to the Second Appellate District of the State of California the Appellate Court reversed and there entered judgment for the defendant.

In this case the Appellate Court considered both the *Adonis,* 38 Fed. (2) 743, and the case of *Bonici v. Standard Oil Co. of N. J.,* 103 Fed. (2d) 437.

The California Court seems to have taken into consideration the special rule urged in the case of seamen but reached a conclusion which was probably a mixture of its own and the admiralty rule with reference to the validity of a seaman's release. The Court said, page 1010:

> "We have discussed this matter at some length because of our concern or responsibility for seamen in cases of this nature. We are not unmindful that a release of this kind is not a bar preventing inquiry into the seaman's rights. As was said by the Third

Circuit Court of Appeals in the case of Adonis, 1930 A. M. C. 1177, 1179, 38 Fed. (2d), 743, 744, 'It can always be looked into * * *.' (Citing cases.) '* * * But a release of this kind formally signed, sealed, and witnessed, is, however, *prima facie* good, and cannot be set aside unless it was obtained by duress, mistake, or, in this case, by fraud, * * *.' Before courts will set aside solemn binding written contracts, proof of their invalidity must be clear and convincing. Were the rule otherwise, a written instrument would afford but slight protection to the parties."

At page 1013 the Court continued:

"With reference to the position of both the seaman and his employer in the making of a settlement of this kind, the United States Circuit Court of Appeals of the Second Circuit, in the case of Bonici v. Standard Oil Company of N. J., 1939 A. M. C. 585, 588, 103 Fed. (2d) 437, 438, said: 'Hence, while "one who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman," Harmon v. United States (5 Cir.), 1932 A. M. C. 1445, 59 Fed. (2d) 372 at page 373, nevertheless a release fairly entered into and fairly safeguarding the rights of the seaman should be sustained. Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into the courts of admiralty. Even if a seaman is the Court's ward, the Court cannot be always at hand to watch over him, for it can only move ponderously in a formal law suit. Fair settlements are in the interest of the men, as well as the employers'."

The petitioner in support of his argument that the release in the case at bar would be invalid if his action

had been brought in admiralty cites (petitioner's brief, page 21) *Sitchon v. American Export Lines, Hume v. Moore-McCormack Lines* and *Bonici v. Standard Oil.*

In *Sitchon v. American Export Lines* the seaman signed a release for $180.00 covering "injuries known and unknown". He relied upon an incorrect diagnosis of a Marine Hospital. It was later discovered that he had sustained a fractured skull. The Circuit Court of Appeals sustained the release and distinguished the case from *Bonici v. Standard Oil* on the ground that in the *Bonici* case an incorrect diagnosis was made by the defendant's physician and relied upon by the plaintiff.

In *Bonici v. Standard Oil* the distinction given above in the *Sitchon v. American Export Lines,* is all that is necessary.

In *Hume v. Moore-McCormack Lines* the release covered certain specific burns and "injuries and illnesses not known". It was alleged that at the time the release was executed neither party knew that the plaintiff was at that time suffering from tuberculosis. The summary judgment in favor of the defendant was reversed and the matter sent back to the District Court for trial. The release was not declared valid or invalid by the Circuit Court of Appeals but the case was sent back for trial with instructions that at that trial it should be discovered "whether appellant had any knowledge or intimation, when he signed the release, that he was suffering incipiently or otherwise, from tuberculosis." (page 347)

The Supreme Court of the State of Pennsylvania concluded its opinion with this remark which we quote (Record, Page 21):

> "We should perhaps add that if we had concluded that the judgment should be reversed on this, the plain-

tiff's appeal, we should not have directed judgment to be entered on the verdict but should have been required, by our consideration of the evidence, to have reinstated defendants' motion for a new trial and remitted the record for consideration by the Court below of that motion."

The statement above was doubtless inspired by the complete lack of credibility of the plaintiff's testimony.

It would appear and is here urged that the most the petitioner may obtain by this appeal is a new trial. But, assuming that this Court should adopt the view that the release in this case should not have been subjected to the "clear, precise and indubitable" rule but should have been considered in the light of the alleged admiralty rule and that with such instructions the matter should be sent back to the lower Court for re-trial and assuming further that the State Judge applying the so-called admiralty rule, should come to the conclusion that by its application the release was invalid and then further assuming that the case when submitted to the second jury would again result in a verdict in favor of the plaintiff; under such circumstances the case would return to this Court to hear the respondent's (who would then be the petitioner) contention that the State Court had not properly applied the admiralty rule and that it should have declared the release to be valid and a bar to petitioner's action. It is, therefore, urged that a circuity of action may be avoided by this Court, at this time, determining, if it finds that the so-called admiralty rule should be applied to the release, whether the release under that rule is valid or invalid. If valid, that is an end to the case. If invalid the case should go back to the lower Court for re-trial for the reason pointed out by the Supreme Court of the State of Pennsylvania.

IV.

CONCLUSION.

The petitioner, referring to the opinion of the Supreme Court of Pennsylvania, states at the end of his brief "the decision would alter the characteristic features of the maritime law and would destroy its uniformity of application". A reversal, not affirmance, of the decision of the Supreme Court of Pennsylvania would do just that. To sustain the contention of the petitioner in this case would be to invite all seamen asserting claims for personal injuries sustained on board vessels, and particularly those who had settled their claims and signed a release, to bring their action in the State Court. The State Courts would then become Admiralty Courts charged with the responsibility of applying admiralty law to all cases where a seaman is a party.

Whether or not the State Court had properly applied admiralty law would be a Federal question appealable direct from the Supreme Courts of the various states to the Supreme Court of the United States. Uniformity would be better maintained by affirming the judgment of the Supreme Court of the State of Pennsylvania and thus confine matters of an admiralty nature to the Admiralty Courts, permitting seamen to come into the State Courts only where the common law law is competent to give a remedy and to give only the remedy afforded by the common law.

Respectfully submitted,

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